The Edward S. Quirk Co., Inc. d/b/a Quirk Tire *and* International Brotherhood of Teamsters, Local Union, No. 25, AFL–CIO. Cases 1–CA–33249 and 1–CA–34383

September 24, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On March 20, 2000, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found, among other things, that the Respondent violated Section 8(a)(5) by unilaterally implementing, after reaching impasse, a discretionary wage plan for its commercial operations employees.

Subsequently, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the First Circuit and the Board cross-petitioned for enforcement. On February 27, 2001, the court denied enforcement of the Board's order with respect to the unilaterally implemented wage plan and remanded the case to the Board for further proceedings consistent with its opinion.[2]

By letter dated June 1, 2001, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. Thereafter, the General Counsel and the Charging Party filed position statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the court's remand and finds, as explained below, that the Respondent's unilateral implementation of its wage proposal for its commercial operations employees violated Section 8(a)(5) and (1) of the Act as alleged.

Background

The pertinent facts are as follows. The Respondent and the Union had been bargaining for a new collective-bargaining agreement since June 3, 1994.[3] The parties reached impasse on May 15, 1995. On June 1, 1995, the Respondent implemented its final wage incentive proposals. The implemented wage incentive proposal for the unit employees in commercial operations[4] stated that they would be paid "at a base rate of not less than $8.90 an hour, however, the Company may continue its current marketplace pay practices for the term of this contract."[5]

According to the unrebutted testimony of Union Business Agent Vincent Pisacreta, by proposing to continue the "marketplace pay practices" the Respondent was proposing that "they would pay the individual what they believe [sic] he was worth to them." The record shows, however, that during the previous contract term, the Respondent increased wages and contract rates in order to stay competitive with other tire businesses.[6] According to the Respondent's co-owner, Peter Quirk, the Respondent unilaterally increased wages without giving Teamsters Local 841, the Union's predecessor, any notice or opportunity to bargain. In addition, according to the Respondent's own wage records, as of June 1, 1995, when it implemented its wage proposal, all of the employees in the commercial operations department were paid more than $8.90 per hour.

In its original decision, the Board found that the Respondent's implementation of its wage proposal for its commercial operations employees violated Section 8(a)(5) and (1) of the Act. The Board adopted, without comment, the administrative law judge's finding that the Respondent's wage proposal for its employees in the commercial operations department "sought to retain unlimited discretion to adjust wages and/or alter the wage incentive plans, without any established criteria for determining the method, manner, time, duration, or amount of the adjustments."[7] The Board also adopted the judge's finding that the Respondent's wage proposal

[1] 330 NLRB 917.

[2] 241 F.3d 41 (1st Cir. 2001).

[3] There had been a prior agreement, effective January 19, 1991, to January 31, 1994, between the Respondent and Teamsters Local 841. In January 1994, Teamsters Local 841 merged with the Union (Teamsters Local 25), which became the bargaining agent for all the unit employees covered by the contract.

[4] This wage proposal encompassed 9 employees in the approximately 17-employee bargaining unit. These nine employees filled six different job classifications. The contractual rate of pay in 1992 for these six classifications ranged from $8.90 per hour for commercial tire changers to $10.65 for off-road servicemen.

[5] The wage incentive plan for the mechanics and alignment technicians was based on a nondiscretionary, fixed formula. The wage incentive proposal for the mechanics provided for a minimum hourly wage of $10 plus a commission of 6 percent on all parts and labor. The wage incentive proposal for the alignment technicians provided a minimum hourly wage of $8 plus an additional payment of $5 for every "2 wheel" alignment and $6 for every "4 wheel" alignment. The proposal also provided that the incentive for employees in each classification would be paid on a monthly basis. The Board found that the implementation of this plan was lawful and this portion of the wage incentive plan is no longer at issue. *Quirk Tire*, 330 NLRB at 917 fn. 2.

[6] Not all employees in the same classification were paid the same amount (as is evidenced by road servicemen J. Darrow earning 74 cents more per hour than road serviceman T. Bambery), but no criteria were presented for determining such differences within a classification.

[7] Id. at 927.

allowed the Respondent "broad discretionary power to unilaterally adjust wages and the wage incentive plans without any established criteria,"[8] and as such was in contravention of *McClatchy*.[9]

The court denied enforcement of this part of the Board's Order, noting that "*McClatchy* is based on employer discretion and discretion is a matter of degree."[10] The court remanded the case to the Board for "something more of a reasoned explanation of where it draws the line (with regard to the *McClatchy* exception) and why the line has been crossed in this instance."[11]

Analysis

In accepting the court's remand, we recognize its opinion as the law of the case. We have set forth our reasons for holding that the Respondent's implementation of its wage proposal was impermissible under *McClatchy*.[12]

In *McClatchy Newspapers*, supra, the Board carved out an exception to the general rule allowing an employer to implement its final offer after good-faith negotiations have led to an impasse. Under this exception to that rule, an employer may *not* unilaterally implement wage proposals "that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay."[13]

Here, the unilaterally implemented wage proposal confers on the Respondent the ability to make recurring unilateral decisions over employees' wages, because, as noted by the court, it allows the Respondent to "choose between marketplace pay and $8.90 per hour."[14] Thus, as described above, the proposal states that the commercial operations employees would "be paid at a base rate of not less than $8.90 an hour, however, the Company *may* continue its current pay practices." (Emphasis added.)

In particular, we find that by including the word "may" in its implemented wage proposal, the Respondent reserved to itself the recurring decision of whether to pay the commercial operations employees the $8.90 per hour minimum, *or* to adjust wage rates to the "current marketplace pay."[15] In other words, the Respondent has unfettered discretion to pay $8.90 per hour *or* a higher wage rate reflected by "current marketplace pay practices." Assuming arguendo that the quoted phrase yields a quantifiable amount, the Respondent nonetheless has unfettered discretion to choose that amount or $8.90.[16]

The inclusion of the word "may" in this provision necessarily precludes any basis for meaningful review of whether a wage change constitutes a departure from the Respondent's unilaterally implemented wage proposal. Because the Respondent has virtually total discretion with respect to whether to increase wages, there could be no basis for the Board or a reviewing court ever to conclude that the Respondent had improperly failed to grant such an increase. Furthermore, given that the Respondent likewise has virtually total discretion to reduce wages to at least $8.90 per hour, there could be no basis for the Board or a reviewing court ever to conclude that the Respondent had improperly cut wages to any rate down to that level. Thus, the wage proposal effectively allows the Respondent to make recurring unilateral changes in wage rates with unfettered discretion.

In its remand to the Board, the First Circuit noted that, under *McClatchy*, an employer is permitted to make one set of unilateral changes per impasse, but is required to bargain again with the union if it wants to make further changes later on. As the court explained in its description of the Board and court *McClatchy* decisions, allowing an employer to make a series of unilateral changes "would make a union seem impotent to its members over time and further undermine the union's bargaining ability by creating uncertainty about prevailing terms."[17] The Respondent's implementation of its wage proposal raises this concern because employees reading the proposal would realize that the Respondent had complete discretion to decide whether to increase wages during the duration of the contract, and complete discretion to cut wages to as low as $8.90 per hour. Thus, the commercial operations employees would realize from this provision that the Respondent is only required to provide a wage base of at least $8.90 per hour, a rate lower than all the com-

[8] Id.

[9] *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. in relevant part 131 F.3d 1026 (D.C. Cir. 1997), cert. denied mem. 524 U.S. 937 (1998).

[10] *Quirk Tire v. NLRB*, 241 F.3d at 45.

[11] Id.

[12] Id.

[13] *McClatchy Newspapers*, supra at 1388. In that case, the employer's merit increase proposal "set no criteria for the amount or timing of merit increases and also failed to provide for Guild participation, either in the initial determination of merit increases granted to particular employees or afterwards through the contractual grievance procedure." The provision also guaranteed minimum wages at the current level. Id. at 1386–1387.

[14] *Quirk Tire v. NLRB*, supra at 44–45.

[15] Thus, we clarify that our concern here is that the proposal retains for the Respondent these two choices, and not merely the base of $8.90 per hour, as the court may have suggested at one point. Id. at 45. We note, in this regard, that the merit increase provision found unlawfully implemented in *McClatchy Newspapers* also guaranteed minimum wages at the current levels.

[16] We recognize that if the Respondent opted to grant a higher wage increase the Union could file a grievance alleging that the increase did not reflect "current marketplace pay practices." However, the basic decision to stick with $8.90 or pay a higher rate could not be successfully grieved.

[17] *Quirk Tire v. NLRB*, supra at 43.

mercial operations employees are currently earning. These circumstances could reasonably create "uncertainty" about the "prevailing terms" during the duration of the contract,[18] which, in turn, could reasonably cause employees to conclude that the Union did not possess any real bargaining ability over the issue of wages.[19]

For these reasons, we find that the Respondent's wage incentive proposal for its commercial operations employees invokes the precise concerns raised in *McClatchy*. Accordingly, we affirm the Board's earlier finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing that proposal at impasse.

[18] The Respondent's provision for the commercial operations employees stands in stark contrast to its wage incentive provision for the mechanics and alignment technicians, described above at fn. 5, which provided certainty as to the wage rates of those employees during the term of the contract and which the Board, accordingly, found was lawfully implemented at impasse.

[19] The Respondent's past practice would only support any such conclusion by the employees. As noted above, the Respondent increased wages during the past contract term consistent with "current marketplace pay practices" without giving notice to the employees' bargaining representative.

ORDER

The National Labor Relations Board reaffirms its original order, reported at 330 NLRB 917, and orders that the Respondent, The Edward S. Quirk Tire Co., Inc. d/b/a Quirk Tire, Watertown, Massachusetts, its officers, agents, successors, and assigns shall take the actions set forth in that Order.

Dated, Washington, D.C. September 24, 2003

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD